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Sup. Ct. of Mod. Sundries

Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Dec 8, 1900.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

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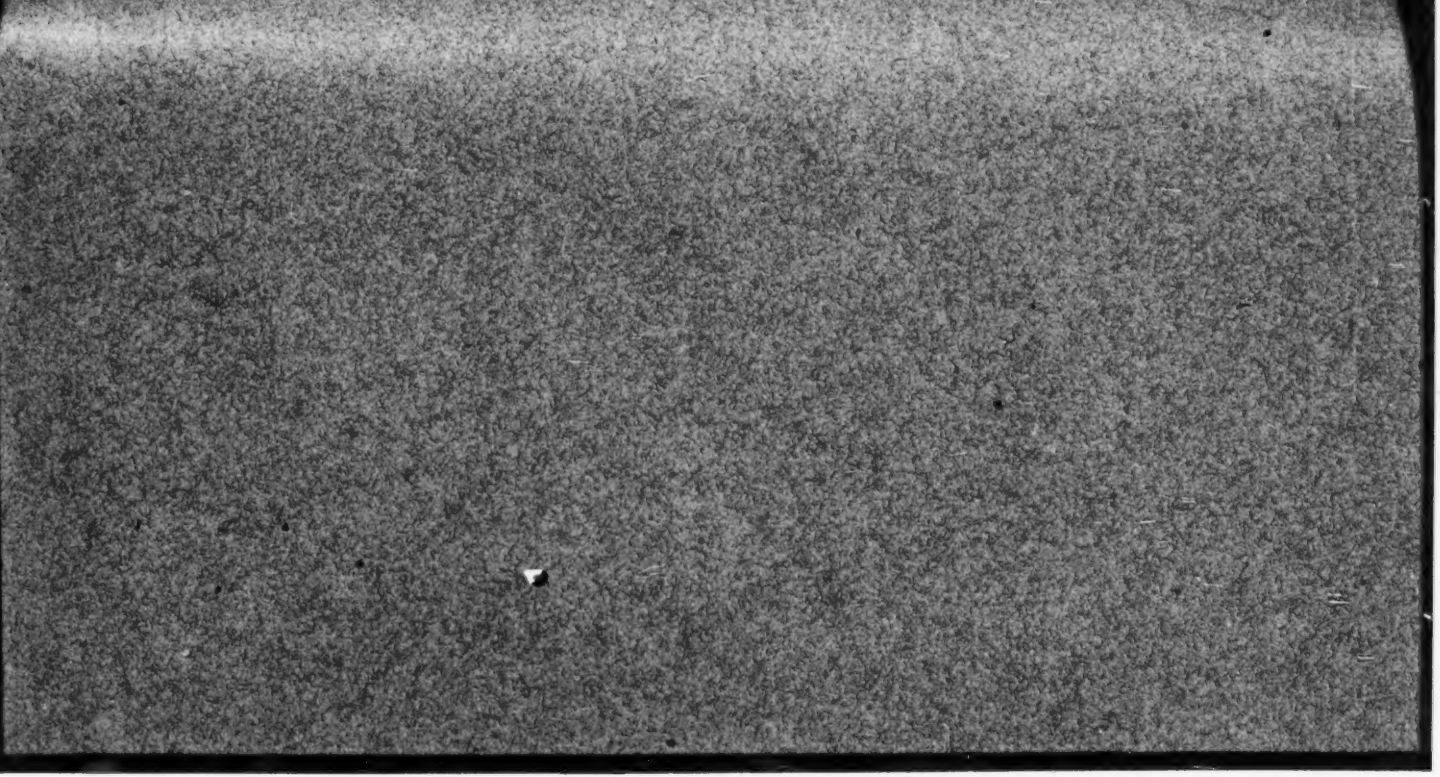

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Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 387.

CHARLES F. W. NEELY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

FIRST.—The Act of June 6, 1900, is, in effect, a treaty or compact with a foreign state, the power to make which is by the Constitution vested exclusively in the President and the Senate.

The establishment of a system whereby a government obligates itself to surrender fugitives charged with offenses in the territory of a foreign nation, and to thereby subject them to criminal prosecution in such foreign place, either with or without conditions as to their future treatment and trial, is, in effect, and to all practical intents and purposes, a treaty. It certainly is the assumption of a relation toward a foreign government. All power con-

cerning foreign relations of this character is by our Constitution vested exclusively in the President and the Senate, who together constitute what is known as the treaty-making power.

Any legislation by Congress which deals, directly or indirectly, with matters thus committed to the diplomatic branch of the government, is an unlawful and unauthorized usurpation of that power, and hence a plain violation of the Constitution.

(*a.*) In the celebrated case of Holmes *v.* Jennison, 14 Peters, 540, which came before this Court in 1840, the plaintiff in error was arrested in the State of Vermont, on a warrant issued by the Governor of that State, directed to John Starkweather, Sheriff of Washington County,

> "setting forth that an indictment had been found by a grand jury of the District of Quebec, in the British Province of Lower Canada, against said Holmes, for the crime of murder, * * * and that, as it was fit and expedient that he should be made amenable to the laws of the county where the offense was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the State of Vermont and the Province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him, to the end that he might be there dealt with as to law and justice appertained."
>
> 14 Peters, 561.

At this time the stipulation between this and the British Government for the mutual delivery of fugitives from justice "was no longer in force," and "the renewal of it" was "a subject of negotiation between the two governments."

Ibid., p. 542.

Holmes was taken before the Supreme Court of Vermont on *habeas corpus*, and a motion was made for his discharge

"upon the ground of the insufficiency of the cause alleged for his detention, as being at variance with the provisions of the Constitution of the United States."

Ibid.

The Vermont Court rendered judgment against the application, and ordered the prisoner to be remanded, whereupon a writ of error was sued out and prosecuted in this court, where it was argued that the surrender of persons charged with crimes in foreign countries was a subject wholly of a national character which had been exclusively committed by the Constitution to the treaty-making power; and hence that the act of Governor Jennison was a plain usurpation of that power. The Court being equally divided on the question of jurisdiction the writ was dismissed; but the views of Chief Justice Taney so plainly upheld the plaintiff in error's contention, and are so much in point here, that while perhaps not controlling in the present case, we venture to quote them. He said:

> "The power which has thus been exercised by the State of Vermont is a part of the foreign intercourse of this country, and has undoubtedly been conferred on the federal government. Whether it be exclusive or not is another question, of which we shall hereafter speak. But we presume that no one will dispute the possession of this power by the general government. *It is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors, and other public ministers.* The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and State gov-

ernments. And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may safely be assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And, as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the *treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced*, when it demands the surrender of any one charged with offenses against it."

And further:

"It being evident, then, that the general government possesses the power in question, it remains to inquire whether it has been surrendered by the states. We think it has; and upon two grounds. 1. According to the express words of the Constitution, it is one of the powers that the state are forbidden to exercise without the consent of Congress. 2. It is incompatible and inconsistent with the powers conferred on the federal government."

* * * * * *

In speaking of the treaty-maker power conferred on the general government, we have already stated our opinion of the meaning of the words used in the Constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the States, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the State agreed to deliver up fugitives charged with offenses committed in Canada.

But it may be said that here is no treaty; and, undoubtedly, in the sense in which that

word is generally understood, there is no treaty between Vermont and Canada. For when we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations; and as no clause in the Constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the State of Vermont.

But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the Constitution, the States are forbidden to enter into any "agreement" or "compact" with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.

* * * * * *

The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.

* * * * * *

Every one will admit that an agreement formally made to deliver up all offenders who, after committing crimes in Canada, fly for shelter to Vermont, would be unconstitutional

on the part of the state. So an agreement, after Holmes had escaped to Vermont, written and signed by the state and provincial authorities, by which the Governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would, unquestionably, be unconstitutional. Yet precisely the same thing is done in this case, without a regular and formal agreement. It is, in some way or other, mutually understood by the parties that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. *The Constitution looked to the essence and substance of things, and not to mere form.* It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made. The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in several States. Provisions were, therefore, introduced to cut off all negotiations and intercourse between the State authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the State authorities and a foreign government. Hence prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

* * * * * *

The exercise of the power in question by the states is totally contradictory and repugnant to the power granted to the United States.

* * * * * *

The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong, exclusively, to the one or the other. If it were merely the power to surrender the fugitive, it might be concurrent; because either might seize and surrender,

> whose officers could first lay hold of him But the power in question, as has already been stated, is a very different one. It is the power of deciding the very delicate question whether the party demanded ought or ought not to be surrendered. And in determining this question, whether the determination is made by the United States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration, and weighed when deliberating on the subject. Now, it is very evident that the councils of the general government and of the state may not always agree on this subject. The decision of the one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case? They are incompatible with each other, and one must yield. And it being conceded on all hands that the power has been granted to the general government, it follows that it cannot be possessed by the states; because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.

Substitute the word "congress" for "state," and the views of the Chief Justice are directly in point; for plainly the function of the treaty-making power, viz., the President and the Senate, can be no more infringed or usurped by congress than by one of the states.

(*b.*) In the case of People *ex rel.* Barlow *v.* Curtis, 50 N. Y., 321, the Governor of the State of New York ordered the delivery to the Belgian authorities of Carl Vogt, charged with a crime in Belgium. The Governor acted in pursuance of a New York statute, passed in 1822 (1 R. S., 468, 5th ed.), providing for the surrender by the executive authority of the state of fugitives from foreign justice charged with "any crime, except treason, which by the laws of this state, if committed therein, is punishable by death, or by imprisonment in state prison."

In holding that the statute in question was a violation of the constitution of the United States, Chief Judge CHURCH, delivering the opinion of the Court of Appeals, speaking of the case of Holmes *v.* Jennison, said:

> "I think we should regard that case as an authoritative decision against the constitutionality of the act in question. Although the appeal was dismissed, yet the opinion of Chief Justice Taney upon the merits in favor of the discharge of the prisoner was concurred in by three of his associates, Story, McLean and Wayne, and, as to the merits, substantially by two others, although the latter agreed to a dismissal of the appeal upon other grounds.
>
> "The decision was regarded as binding upon the return of the case by the Supreme Court of Vermont; and the prisoner was discharged (12 Vt., 631). I am not aware of any adjudication since that time impairing the effect of this decision; and as the subject is one within the cognizance of the federal courts the question should be regarded as settled."

The learned Judge proceeded:

> "This is a much stronger case for holding the act of the governor invalid than the Vermont case. There the state had not acted at all. The act of the governor in issuing his warrant was not authorized by law, nor did it appear that any demand had been made by the Canadian government for the rendition of the prisoner; and one of the judges agreed to a dismissal of the appeal upon the latter ground. Here the state has made *a permanent regulation for the delivery of fugitives*, and the record shows that a formal demand was made upon the governor according to the terms of the statute. If the same facts had appeared in that case, a judgment discharging the prisoner would have been rendered.
>
> "In the next place, the elaborate and exhaustive opinion of Chief Justice Taney commends itself to our judgment as a correct ex-

position of the law on the subject, and it would be difficult to add anything to the force of his reasoning. It is admitted by the Attorney-General that the general government possesses the power over the subject of extradition of fugitives from justice, and that if it had exercised the power in regard to Belgium it would be exclusive, and that no one could be delivered except through the federal machinery; but he insists that this power is dormant as to all countries with which the government have made no treaty; that the states are not prohibited from exercising it, and that such exercise is not repugnant or inconsistent with the power conferred on the government. This position is not tenable. It is true that a grant of power to the general government does not necessarily operate as a prohibition of the same power by the states (Sturges *v.* Crowninshield, 4 Wheat., 122). There are subjects over which the general government and the states may exercise concurrent authority. If the terms of the grant are not exclusive, and there is no express prohibition upon the states, and no repugnancy or inconsistency in its exercise by the states, the authority is concurrent.

"This subject is not one of that character. *The whole subject of foreign intercourse is committed to the federal government.* Indeed, this was one of the principal purposes of the Union. *As to foreign countries, the states, as such, are unknown. The treaty-making power is exclusive in the general government not only, but the states are prohibited from exercising it in express terms.* So the appointment of ambassadors and receiving ambassadors from foreign countries are confided to the Union, and the states are prohibited from making any compact or agreement with any foreign power. The act of the legislature under consideration authorizes foreign ministers and officers of foreign governments to make a demand upon the governor, and empowers him to treat with these ministers, and accede, in his discretion, to their demand. It is patent that the exercise of such a power by the states may frustrate the foreign policy of the government,

> both as to the countries with which the government has made a definite treaty, and as to those with which it has not."

And further:

> "Again, it *being conceded that extradition is included within the treaty making power*, if the states may regulate it why may they not regulate any other question included in that power? Although expressly prohibited from entering into a treaty, the regulation of the proper subjects of it is a practical exercise of the power which renders the prohibition nugatory. In any view of the question the repugnance is clear. I think also that the express prohibition against making an agreement with a foreign power is violated by the act of the legislature."

(*c.*) The reasoning of these cases seems to us absolutely convincing. Every suggestion urged as a reason against the usurpation of the treaty-making power by the states applies with equal force to similar usurpation by Congress. The determination by Congress of the questions of expediency in respect to extraditionary arrangements would be as inappropriate and out of place as the determination by that body of all other matters affecting our foreign relations.

See our main Brief, pp. 102–103.

(*d.*) We submit, therefore, that if Cuba is a foreign state, and even granting for the sake of argument that its government is being temporarily administered by the President "in trust" (not for the United States) for its inhabitants, Congress has no more right to make a treaty with its governmental representatives than any state would have. Certainly, if Cuba is a state with whom we might make a treaty, then we cannot deliver fugitives from justice to her by act of Congress.

If Cuba is not a foreign state, then (assuming the statute was intended to apply to that island), while

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it may not be a usurpation of the treaty-making power, it is nevertheless unconstitutional and void for the other reasons already advanced.

Of course, if Cuba is not a foreign place at all, then the appellant is illegally detained under the act.

SECOND.—In reply to the argument of the Government.

I.

The learned counsel for the Government contends that—

> "The United States is at the present time the *de facto* and *de jure* sovereign in the Island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object."
>
> Brief for the United States, .

He says that—

> "there is not and never has been a Cuban Government possessing sufficient attributes of sovereignty to warrant its recognition by the family of nations."
>
> *Ibid.*, .

And again:

> "Cuba is therefore 'territory *pro tempore*' of the United States * * * occupied by our soldiers, both under the war-making power and the treaty-making power," &c.
>
> *Ibid*, .

(*a.*) This was indeed the view taken in the New Orleans case cited by counsel,

> Louisiana *v.* Cox, *Ibid.*, ,

where it was held that Cuba is "a Territory of the United States" within the meaning of Section 1038 of the Revised Statutes of Louisiana, since it is a place

> "over which the United States exercises *con-*
> "*trol, sovereignty, domain and occupation.*"
> *Ibid.*,

If this is so, it naturally follows, as we have already urged, that the Island of Cuba is not "foreign territory," and that the Act of June 6, 1900, therefore does not authorize the appellant's extradition.

Plainly a place cannot be "foreign" to the United States if it is within the national jurisdiction and dominion, and subject to its absolute and undisputed sovereignty and control. If Cuba is "'territory *pro tempore*' of the United States," and therefore without the dominion or jurisdiction of any other sovereignty, it is domestic and not foreign territory.

(*b.*) While it is true that "conquered territory does not become a recognized and permanent part of the United States until the political branch of the government asserts it as such" (Brief for the United States, p. 15) yet if Cuba is "land appertaining to the United States" by reason of conquest *and treaty stipulation*, and subject to our jurisdiction and dominion *pro tempore*" as the government insists it is (*Ibid*), then the political branch of the government *has* accepted it as a part of the United States, and it is now "territory or other property belonging to the United States," in dealing with which all "the agencies of the general government" must observe the constitutional limitations affecting "the fundamental rights of life, liberty and property."

> Mr. Justice Harlan in Callan *v.* Wilson,
> 127 U. S., 540.

It was held in Fleming *v.* Page, 9 How., 603, that Tampico did not cease to be foreign upon its occupa-

tion *by our military forces.* But this was because the political branch of our government had not asserted dominion and sovereignty, or otherwise exercised authority there, as it has in Cuba. The President is not the political branch. He cannot enlarge the limits of the United States.

> "This can only be done by the treaty-making power or the legislative authority. * * * His (the President's) duty and his power are purely military. * * * But his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."
>
> 9 How., 603.

In *United States* v. *Rice*, 4 Wheat., 246, the town of Castine, in Maine, was captured by the British troops on September 1, 1814, and was held until the conclusion of the war in February, 1815 During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported according to regulations established by itself. After the conclusion of the treaty of peace, and the surrender of Castine to our troops, our Government sought to collect the tariff duties on goods which had been imported into Castine by one of its citizens during its military occupation by the British army. In an opinion by Mr. Justice Story this court held that such duties could not be exacted, saying:

> "By the conquest and military occupation of Castine the enemy acquired that *firm possession* which enabled him to exercise *the fullest rights of sovereignty* over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a *temporary allegiance to the British Government,* and

> were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience."

Both of these decisions fully recognize the principle that territory is "foreign" when our sovereignty and dominion does not extend to, or has been suspended over it. It follows that territory over which our sovereignty and dominion does extend, and is conceded by the political branch of the Government to extend in the fullest and amplest degree, cannot be regarded as foreign.

II.

It is argued that the provisions of the Constitution regarding indictment by grand jury and trial by jury and others

> "governing the procedure in criminal cases do not apply to the territories of the United States, unless Congress expressly makes the constitution applicable to such newly acquired territories."
>
> Brief for the United States.

In support of this proposition some remarks are quoted from an address of the Solicitor-General before the Pennsylvania Bar Association in June last, wherein that gentleman having assumed that

> "the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are *not fundamental in character*, and therefore do not tie the hands of *the inhabitants of a territory* when organizing a state,"

proceeds to inquire,

> "how can they tie the hands of the President and Congress ... preserving order and protecting life and property in our new possessions?"

With what seems to the learned counsel for the appellee "admirable clearness and convincing force," the Solicitor-General then lays down the proposition that because the President had found in these "new possessions"—"no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law,"—

> "these guaranties must be held inoperative or the preservation of peace and order and the protection of life and property be abandoned,"

because, otherwise crime could be punished in no other way, the United States being unable to supply these "*impossibilities*."

(*a.*) It does not seem to have occurred to the Solicitor General that a grand and petit jury system might have been organized as readily in Cuba (with the inhabitants of which Island we were certainly on better terms than Gen. Kearney found the natives in the places he conquered) as, under far more difficult circumstances, it was established in Louisiana and the former Mexican possessions as soon as they came under our control.

(*b.*) The alternative that, "until the progress of the people" in new territory, the provisions of our Constitution are to be "held inoperative," or "the preservation of peace and order and the protection of life and property be abandoned," brings us back to the argument of "necessity" which this Court long since utterly repudiated as annihilative of the underlying theories of our Government.

See our main Brief, p. 139.

(*c.*) It is quite true that this Court has held that *the States* may do away with some of the methods of common law procedure applicable to criminal prosecutions, *e. g.*, grand juries, trial by jury, &c., without violating the Constitution, but this solely upon the ground that the provisions of the Consti-

tution in this regard were binding only upon the Federal Government, and not upon the States, which has never surrendered to the general government the right to determine the practice and procedure of their courts.

Holden *v.* Hardy, 169 U. S., 366.

The case just cited involved the constitutionality of an act of the legislature of the *State* of Utah which prohibited the employment of workingmen in underground mines, smelters, &c., for more than eight hours a day, and declared any violations of the act to be a misdemeanor. The statute was assailed as repugnant to the constitution and particularly to the Fourteenth Amendment, in abridging the privileges or immunities of citizens of the United States, depriving both the employer and employee of property without due process of law, and denying them the equal protection of the laws. It was upheld (Justices Brewer and Peckham dissenting) as a valid exercise of the police power of the state, viz., as a measure tending to the protection of public health.

Speaking of the various cases wherein this court had construed the Fourteenth Amendment (which for the first time authorized the federal courts (p. 382) to "declare invalid all laws and judicial decisions of the states abridging the rights of citizens or denying them the benefit of due process of law"), Mr. Justice Brown, delivering the opinion of this court, said (p. 383):

> "These cases may be divided, generally, into two classes: First, where a state legislature, or a state court is alleged to have unjustly discriminated in favor of or against a particular individual, or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; Second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice or the protection of the individual."

The learned counsel for the government quotes an extract from the language of Mr. Justice Brown, wherein it is suggested that the *annexation* of territory, "whose jurisprudence is that of the civil law," would not necessitate an abandonment of its traditions, laws and systems "and the substitution of a system with which its inhabitants" had no previous acquaintance or sympathy.

These observations (which were of course purely *obiter*) were made in a case where the Court was considering the extent of the police power of a *state* of the Union.

It was after adverting to a long line of decisions affecting the latter class, wherein the court had held that there is nothing in the federal constitution preventing a *State* from adopting any system of laws of judicature it saw fit, so long as such system did not violate the fundamental principles "to which each member is bound to accede as a condition of its admission as a *State*," that the learned justice made use of the language in question.

(*d.*) The distinction between the powers and attributes of the *States* of the Union as distinguished from those of the general government is well understood.

The former possesses all the sovereign rights and functions of independent sovereignties except so far as those rights and functions have been expressly surrendered to the general government by the Constitution, whereas the general government, while possessing only those powers enumerated in the Constitution—or, in other words, only the powers intended to be ceded to it by the States—is moreover limited in the exercise of its authority by many provisions which this Court has repeatedly held are not binding upon the States, *e. g.*, the first eight amendments.

Thus, while the *States* may abolish the grand jury system, trial by jury, or the forms of judicial procedure, and establish in their place any methods

compatable with modern ideas admirable in a Republican form of government and which do not violate those

> "immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard,"
>
> Holden *v.* Hardy, p. 389,

the limitations imposed upon the powers of the federal government by these fundamental provisions are binding and obligatory at all times and in all places.

No comment of ours can add force to the language of this court in the Milligan case where, in speaking of these very provisions, it was said (71 U. S., 2):

> "Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus.*"
>
> See Appellant's Brief, p. 160.

(*e.*) The Ross case (140 U. S., 453), as we have already shown (Appellant's Brief, p. 16), was decided, not upon the theory that our consular courts established in semi-civilized or barbarous countries under treaty stipulations exercise the jurisdiction or enforce the laws of the *United States*, but upon the far different principle that the treaty-making power may under our constitution competently accept, on behalf of our consular representatives, an "authority * * * in another country" under the immemorial usage of civilized nations, which the constitution makers must have had in mind when they established our system of government.

(*f.*) The case of Jones *v.* United States, 137 U. S., 202, is cited by the government. But there is nothing in that case which supprts its position. The decision of this Court was simply to the effect that the Courts of the United States had jurisdiction over offenses committed on certain guano islands which the political branch of the government had

determined "appertained to the United States," and which were therefore not only within its territorial, but its "sole and exclusive" jurisdiction. It was not suggested that in the prosecution of such offenses the government could deny the accused the rights and privileges accorded by the Constitution.

These privileges and immunities can scarcely be less recognized in a case arising in Cuba than in one arising in the Navassa Islands.

III.

The Attorney-General admits that—

> "To try him (the appellant) in New York for acts which were in fact committed in the distant City of Habana, would not be in accordance with the great constitutional principles of government which control the administration of justice in both England and America" (Brief for the United States).

But with what seems to us strange inconsistency, he argues that to try him in Cuba, without indictment or jury, under a system utterly repugnant to our ideas of natural right and justice, would entirely accord with these "great constitutional principles."

IV.

We do not contend that the United States is without power to deliver up to justice persons charged with offenses in territory *lawfully* occupied by it, whether or not such territory has been formally incorporated into the nationl domain; nor do we contend, nor have we suggested, that it is so

impotent as to be unable to protect life and property in any place within its lawful jurisdiction. Our position legitimately leads to no such *reductio ad absurdum*.

Nor do we dispute either of the propositions of the government: (1) that the United States has the right to extradite American citizens who are fugitive criminals, or (2) that, if the United States has acquired all the rights of sovereignty in Cuba it may legislate for the punishment of crime therein, and may provide a system of removal whereby offenders may be subjected to such punishment.

We merely insist that in the exercise of these powers the United States is limited to the use of constitutional methods and agencies.

For example no one would argue that the President could lawfully seize an American citizen, and cause his transportation to a foreign country, or even from one place to another in the United States, without "due process of law"; nor that Congress could lawfully authorize such a proceeding on the part of the President, or the courts in the discharge of their appropriate functions uphold it under the constitution. Nor can it be reasonably urged that congress in legislating for the punishment of crime in Cuba, or in any other place within the national jurisdiction, or in providing a rendition or extradition system in aid of such legislation, could violate any one of the constitutional powers which limit and control the legislative power.

If an individual (whether an American citizen, or "a citizen of Cuba," or a citizen of any other place on earth) should commit murder or arson or any other crime in Cuba, and then flee to the United States, there are doubtless ample means in our government whereby his surrender and prosecution may be constitutionally brought about.

What we do contend, and all that it is necessary for us to contend in this case, is that if the Act of June 6, 1900, applies to Cuba, it violates the constitution in the ways we have already pointed out.

V.

Chief Justice Marshall said in the well known case of McCulloch *v.* Maryland, 4 Wheat., 316:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

Is the end here sought legitimate? Is it lawful for the President to maintain a military government in foreign territory in time of absolute peace? If so, may he, in the administration of the judicial system which he has made a part of such government, deny to accused persons the rights, privileges and immunities guaranteed by the Constitution from which he derives all his power and authority? May he "subject American citizens who are in the service of their own Government to the jurisdiction and capricious decisions of tribunals composed of persons alien in race and sentiment, administering a system of laws * * * which would not be tolerated in any American community"?

The Act of June 6, 1900, was concededly enacted as a means of lending aid and support to such a government, administered in the manner suggested, and of subjecting to its methods all persons accused of crime within the territory over which it extends, whether American citizens or not, who should flee to or be found in the United States.

Is this an end "within the scope of the Constitution"? This is the question which this Court is asked to determine. We have presented the considerations which seem to us to necessitate a negative answer.

Respectfully submitted,

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